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Supreme Court of the United States

OCTOBER TERM—1948

No. 121.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et al.*,
Respondents.

BRIEF FOR THE PETITIONER, BLACK DIAMOND STEAMSHIP CORP.

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ROBERT STEWART & SONS, LTD., *et al.*,

Respondents.

BRIEF FOR THE PETITIONER, BLACK DIAMOND STEAMSHIP CORP.

This case is before the Court on writs of certiorari granted October 11, 1948, on separate petitions of Black Diamond Steamship Corp., (No. 121) and the United States of America (No. 130) (R. 29) (The petitioners, for brevity, will be called "Black Diamond" and "United States" whenever it becomes necessary to distinguish between them). The decree under review is that of the United States Circuit Court of Appeals for the Second Circuit, dated March 29, 1948 (R. 28) affirming an order of the United States District Court for the Eastern District of New York, which sustained the exceptions of the respondents to the petitioners' petition for limitation of liability and dismissed the petition. (R. 14, 15).

Statement of Facts.

The case at bar arises out of a collision between the American steamer *Norwalk Victory*, of which the United States is the owner and Black Diamond the bareboat char-

terer, and the British steamer *Merganser*, in the Schelde River, Belgium, on April 28, 1947. The *Merganser* was sunk and the respondents, owners of cargo which went down with her, sued the petitioners in the United States District Court for the Eastern District of New York, demanding damages amounting to $1,000,000. (Petition, Art. Seventh, R. 5, 6).

Thereafter the petitioners, within the six-months statutory period, filed this petition for the limitation of their liability under the law of Belgium, which is the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of Liability of Owners of Seagoing Vessels (Appendix A, *infra* pp. 37, 38). This Convention, which we shall refer to as the Brussels Limitation Convention, was signed at Brussels on August 25, 1924, was ratified by Belgium on June 2, 1930, and first took effect on June 2, 1931 (Petition, Art. Eleventh, R. 6).

Since the respondents' exceptions perform the function of a demurrer, all well pleaded allegations of fact in the limitation petition stand as admitted for the purpose of the exceptions. *Suspine et al.* v. *Compania Transatlantica Centroamericana, S. A., et al.*, 37 Fed. Supp. 263, 264 (S. D. N. Y.); *United States Navigation Co., Inc.* v. *Black Diamond Lines, Inc.*, 37 Fed. Supp. 1005 (S. D. N. Y.). This admission includes the allegations regarding the law of Belgium, which, being foreign law, is of course a matter of fact. *Talbot* v. *Seeman*, 1 Cranch, 1; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445; and *Shapleigh* v. *Mier*, 83 Fed. (2d) 673, 676 (C. C. A. 5).

The facts alleged in the limitation petition, so far as relevant to the case, are these:

The *Norwalk Victory*, when the collision occurred, was engaged on a voyage from New York to Antwerp, Belgium, and Rotterdam, The Netherlands. She left Antwerp for Rotterdam at 7:50 P. M., on April 28, 1947, with some 1150

tons of cargo aboard. While proceeding down the Schelde River she collided with the British steamer *Merganser* at 11:45 P. M., near Lille, Belgium. The *Merganser* was sunk and her chief steward was killed.

Shortly afterward British and Continental S. S. Co. Ltd., owner of the *Merganser*, sued Black Diamond in the High Court of Justice of England, Probate, Divorce and Admiralty Division, for the loss of the vessel. In that suit Black Diamond was required to post bail in pounds sterling equivalent to $1,000,000.

About six months later the present suit was brought against the petitioners in this country (Petition, Arts. Fifth and Seventh, R. 2-6; Findings of Fact Nos. 5-9; R. 16, 17).

Article 1 of the Brussels Limitation Convention limits the liability of the owners of a seagoing vessel to an amount equal to her value, freight and accessories with respect to compensation due to third parties because of damage caused by the faults of the master, crew or pilot of the vessel, provided, however, that such liability shall not exceed an aggregate sum equal to £8. per ton of the vessel's tonnage. Article 4 defines the freight as a lump sum fixed at 10% of the vessel's value at the commencement of the voyage. Article 7 provides for an additional payment of £8. per ton in the case of death or personal injury. Article 10 makes the Convention applicable to an operator or charterer who is liable under Article 1 or Article 7. Article 11 provides for the calculation of tonnage, which is net tonnage plus the amount deducted from the gross tonnage on account of engine room space to ascertain the net tonnage (Petition, Arts. Tenth-Twelfth; R. 6-8; Findings of Fact Nos. 11-17, R. 17, 18).

On the basis of the *Norwalk Victory's* tonnage, calculated as provided in the Convention, plus $100,000, or 10% of her sound value at the commencement of the voyage, the

limitation of the petitioners' liability for property damage under the Convention is $325,028.79. The United States, as a corporation sovereign, was of course not required to give a bond. Black Diamond, however, posted a surety bond for $325,028.79. (Petition, Art. Thirteenth, R. 8; Findings of Fact Nos. 18-21, R. 18; Bond, R. 10-12).

Convention and Statutes Involved.

The relevant provisions of the Brussels Limitation Convention are set forth in Appendix A, *infra* pp. 37, 38. The full text of the Convention will be found in Benedict on Admiralty, Sixth Edition, Vol. 6, pp. 88-91. R. S. 4283(a) and R. S. 4285 are set forth in Appendix B, *infra* p. 39.

Proceedings in the District Court and the Circuit Court of Appeals and the Decisions of Those Courts Therein.

1. The District Court:

The respondents excepted to the petition on these grounds: (a) In that the allegations of the petition were insufficient to give the Court jurisdiction of the proceeding because the petitioners failed to comply with the United States limitation of liability statute, 46 U. S. C. A. Chapter 8; (b) because the petitioners did not deposit with the Court a sum, or approved security therefor, equal to the amount of value of their interests in the vessel and her pending freight, nor did they transfer such interests to a trustee, as required by 46 U. S. C. A. § 185; (c) because the petitioners did not comply with Admiralty Rules 51-54 of this Court, 28 U. S. C. A. § 723; and (d) because the petitioners did not comply with Admiralty Rules 31-35 of the District Court (R. 12, 13).

The District Court, in sustaining the exceptions and dismissing the petition, relied on the authority of *Oceanic Steam Navigation Company, Limited* v. *Mellor (The Titanic)*, 233 U. S. 718, and *Royal Mail Steam Packet Co.* v. *Companhia de Navegacao Lloyd Brasileiro*, 31 Fed. (2d) 757 (E. D. N. Y.). It held that a ship-owner's right to limit its liability in a United States Court is derived exclusively from the United States limitation of liability statute, 46 U. S. C. A. §§ 181-188; that this statute does not impose a liability but only limits an existing liability, and so does not relate to the substantive right but to the remedy, which is governed by the law of the forum; that it is a jurisdictional requirement under 46 U. S. C. A. § 185, that a sum, or approved security therefor, be deposited with the Court for the benefit of the damage claimants equal to the value of the ship-owner's interest in the vessel and her freight, and that the petitioners had not met this requirement. The Court held, finally, that the fact that the collision took place in Belgian waters did not affect the principles stated (R. 14, 15). Supplementing its order of dismissal, the Court made Findings of Fact and Conclusions of Law (R. 16-19). It rendered no formal written opinion, its decision being incorporated in its order and Conclusions of Law. The decision has not been reported.

2. The Circuit Court of Appeals:

The Circuit Court of Appeals, *United States et al.* v. *Robert Stewart & Sons, Ltd. et al.*, 167 Fed. (2d) 308 (C. C. A. 2) said that if the petitioners had alleged that the limitation of liability provided by the Brussels Limitation Convention meant that the limit attached to the right, it would have been conclusive upon the exceptions. Nevertheless, it said that it would read the petition as favorably as possible to the petitioners and construe it to mean that the Belgian law did attach the limit to the right. It said further that it did not understand the *Titanic* de-

cision as meaning that the Court would refuse to recognize limits imposed upon a ship-owner's liability by foreign nations, which were attached to the right. The Court said, however, that it was unnecessary to pass upon the question as to whether the petitioners were required to post a bond for a larger sum than that required by the Belgian law because they were in this inescapable dilemma: If the limit of their liabilities is $325,000. and the *Norwalk Victory* is worth $1,000,000. they had no right to institute proceedings for limitation of their liability but were confined to asserting their privilege as a defense to suits brought against them. If, on the other hand, the liabilities might exceed $325,000., the bond posted was too small. The Court said further that the question presented could not arise unless the petitioners were sued at law, and that if a claimant in an action at law should deny their right to limit liability, the issues so raised would be justiciable only in admiralty, where it then might be necessary to decide whether the bond should go beyond the amount of liability. It said, in conclusion, that the right to limit could be tried in the pending admiralty suit, in which, if the claimants defeated the right, obviously the proceeding would not be proper, whereas if the claimants were unsuccessful the same reasons would forbid the proceeding as do at present (R. 25-27).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. § 347(a).

Specifications of Error.

Black Diamond, in its petition for a writ of certiorari, alleged that the Circuit Court of Appeals made the following errors:

1. In affirming the order of the District Court dismissing the petition for limitation of liability.

2. In failing to hold that this petition was properly filed under R. S. § 4285; 46 U. S. C. A. § 185.

3. In failing to hold that since the collision occurred within the territorial waters of Belgium, the limitation of liability provided by the Brussels Limitation Convention applies.

4. In failing to hold that limitation of a ship-owner's liability is a matter of right which is governed by the *lex loci delicti.*

5. In failing to hold that the limitation of liability provided by the Brussels Limitation Convention is a limitation attaching to the respondents' rights and measures the extent of their recoveries against the petitioners.

6. In failing to hold that Black Diamond's interest in the *Norwalk Victory* for the purpose of limitation of liability in the case of property damage is $325,028.79, under the Brussels Limitation Convention, and that the posting of a bond for that amount by Black Diamond was sufficient compliance with R. S. § 4285.

7. In holding this case to be within the rule applied in *The Aquitania*, 20 Fed. (2d) 457 (C. C. A. 2), *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 Fed. (2d) 273 (C. C. A. 2), and *The George W. Fields*, 237 Fed. 403 (S. D. N. Y.).

8. In holding that the question presented by this petition could not arise unless the petitioners were sued at law.

The Questions Presented.

1. In the case of a collision between an American vessel and a British vessel in the waters of Belgium, where a suit for damages based thereon has been brought in a United States Court, is limitation of the ship-owner's liability, as distinguished from the means employed to secure such limitation, determined by the law of Belgium or that of the United States?

2. Is the limitation of a ship-owner's liability, as distinguished from the modes of procedure used to secure it, a matter of right or a matter of remedy?

3. Is the limitation of a ship-owner's liability provided by the Brussels Limitation Convention a limitation attached to the right?

4. If limitation of the petitioners' liability is determined by the law of Belgium, are the petitioners restricted to pleading the Belgian limitation law as a defense in a suit against them or can they also invoke such law by a petition for limitation of liability under R. S. § 4285, 46 U. S. C. A. § 185, and the Admiralty Rules of this Court?

5. In a limitation of liability proceeding filed under R. S. § 4285, wherein the petitioners invoke the limitation of liability law of Belgium, would not the amount of their interest in the vessel and her freight be that fixed by the Belgian law rather than the law of the United States?

6. Is the *Titanic* decision, holding that limitation of liability is a limitation on the remedy, which is governed by the law of the forum, in harmony with this Court's decisions in *Northern Pacific R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190), *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473, *American Banana Co.* v. *United Fruit Co.*, 213

U. S. 347, and *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542?

7. Does the *Titanic* decision accord with the rule on conflict of laws applied by this Court in *The Scotland*, 105 U. S. 24, *The Belgenland*, 5 Sup. Ct. Rep. 860 (114 U. S. 355), *Thommessen and another* v. *Whitwill (The Great Western)*, 6 Sup. Ct. Rep. 1172 (118 U. S. 520), and *La Bourgogne*, 210 U. S. 95, and, if not, should it not be modified accordingly, or overruled?

8. Is not the *Titanic* case in any event distinguishable from this one on the ground that there the disaster occurred on the high seas, whereas here the collision occurred in foreign territorial waters?

9. Were the reasons given by the lower Court for affirming the District Court's order of dismissal valid?

Summary of Argument.

Black Diamond's contentions are these: (1) That since the collision between the *Norwalk Victory* and the *Merganser* occurred within the territorial waters of Belgium, the Belgian law as to the limitation of a ship-owner's liability should be applied and held to measure the extent of the petitioners' liability to the respondents (Point I, pp. 10-18). That the *Titanic* case is distinguishable from this one and that in any event that decision should be re-examined to determine its soundness, in the light of other decisions of this Court in analogous cases (Point II, pp. 18-26). That the petitioners should be held entitled to invoke the Belgian limitation law by petition, under R. S. § 4285, instead of being remitted to pleading that law as a defense in their answer to the respondents' libel, which would make it impossible for them to secure a concourse of claimants (Point III, pp. 27-29). That the reasons given by the lower Court for its affirmance of the District

Court's order are inapplicable to this case (Point IV, pp. 29-31). Finally, that the interests of justice dictate that the Belgian limitation law be applied, for to hold otherwise would lead to the anomalous result of depriving Black Diamond of any effective limitation of liability at all (Point V, pp. 32-35).

POINT I.

The collision having taken place in the Schelde River, Belgium, the petitioners should be held entitled to have their liability, if any, limited in accordance with the limitation of liability law of Belgium.

Under the doctrine of conflict of laws repeatedly applied by this Court, (with the possible lone exception of *The Titanic*) as well as by the lower federal courts, it seems clear that limitation of liability, in the case of a tort occurring within a foreign jurisdiction, is determined by the *lex loci delicti*.

In *Northern Pac. R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190), the plaintiff, as administrator, sued in a Federal Court in Minnesota to recover damages for the death of the decedent, Munro, a Northern Pacific engineer. Munro was killed in Montana, which had no limit on the amount recoverable in a death case. In Minnesota, however, the limit of recovery for death at the time Munro was killed was $5,000. and $10,000. when the case was tried. The jury awarded the plaintiff $10,000.

This Court (WHITE, *J.*) stated that the first question presented was whether the amount of damages was to be controlled by the law of the place of employment and where the accident occurred or by the law of the forum. After referring to the case of *Herrick* v. *Railroad Co.*, 31 Minn. 11, it held (p. 981) that the District Court committed no

error in holding that the right to recover was governed by the *lex loci* and not by the *lex fori*.

In *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, suit was brought in the United States Circuit Court in Texas to recover damages for the death in Mexico of the decedent, a switchman on the defendant railroad.

Under the Mexican law a decree for damages in a death case was analogous to one for alimony, contemplating periodical payments and being subject to modification from time to time. The Court and jury, however, fixed the recovery in a lump sum under the Texas statute.

This Court (HOLMES, *J.*) said (p. 126):

> "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person and may be enforced wherever the person may be found. * * * But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, *and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.* * * * Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught." (Italics ours.)

In *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473, the plaintiff, who had lost his hand in an accident in Cuba through a defect in the machinery of a planing mill, sued the defendant in the United States Circuit Court for the

District of New Jersey. The plaintiff noticed the defect and reported it and testified that the employer told him that it would be repaired and that in the meantime he was to go on with his work. The Court instructed the jury that if these were the facts the defendant had assumed the risk for a reasonable time. There was no evidence as to what the law of Cuba was but the trial Court said that in the absence of proof by the defendant that it differed from the *lex fori* the latter would be applied.

A judgment for the plaintiff was reversed by this Court. Mr. Justice HOLMES, after referring to certain classes of rudimentary contracts or torts, as to which all civilized countries might impose an obligation, said (p. 478):

> "But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. * * * The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. * * * That and that alone is the foundation of their rights."

Also (p. 479):

> "The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

The Court (p. 478) referred to *The Scotland, infra,* as being an exceptional case.

In *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, the suit was to recover three-fold damages under the Act to Protect Trade against Monopolies. The alleged

wrongful acts, however, took place in Costa Rica. This Court (HOLMES, *J.*) said (p. 355):

> "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.
>
> No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."

Also (p. 356):

> "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. • • • For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign contrary to the comity of nations, which the other state concerned justly might resent."

In *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542, a telegram was despatched from South Carolina to the plaintiff in Washington, D. C. notifying her of her sister's death. Delivery was negligently delayed in Washington, causing the plaintiff to miss the funeral. She sued in a South Carolina State Court under the South Carolina Civil Code, alleging mental anguish and consequent damages. A recovery was allowed under that Code, regardless of the law of Washington.

This Court reversed the judgment, Mr. Justice HOLMES saying (pp. 546, 547):

> "Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground *but the measure of the maximum recovery. Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 126. *Cuba R. R. Co. v. Crosby*, 222 U. S. 473, 478, 480. (A limitation of liability *may* stand on different grounds, *The Titanic*, 233 U. S. 718). The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail." (Italics ours).

In *Mosby v. Manhattan Oil Co.*, 52 Fed. (2d) 364 (C. C. A. 8), the plaintiff, owner of a ranch in Kansas, sued the defendants in the federal court in Missouri for damages resulting from a nuisance created and maintained by the defendants. The defendants were engaged in oil drilling and producing operations on higher land adjacent to the ranch, and as a consequence salt water and crude oil escaped from the wells and settled on the plaintiff's land and also permeated the water in a stream passing through it, rendering the land unfit for cattle raising.

The defendants moved for a directed verdict on the ground of a misjoinder of parties and causes of action, they having been acting independently and not concurrently or jointly in the matter. Under the law of Kansas they could be sued jointly, but not under the law of

Missouri. The trial Judge held that the law of the forum applied and granted the motion.

The Circuit Court of Appeals reversed the judgment, saying (p. 367):

> "The correctness of the ruling that the law of Missouri governs is challenged, and raises the main question on this appeal. The answer to the question depends upon whether the matter involved is one of substantive law or procedural law. It is to be noted that, under the Kansas cases, recovery may be had against each defendant for the full amount of the damages suffered; whereas under the Missouri cases recovery may be had against each defendant only to the extent of the injuries inflicted by his own wrong. We think the difference is more than a procedural one; it goes to the extent or scope of the cause of action. The measure of the damages which plaintiff has sustained may be the same in Missouri as in Kansas; but the extent of the liability of each defendant is quite different in the two states. We think the difference is one of substantive right."

Was the law of Missouri, as compared with the law of Kansas, anything but a limitation of the liability of the individual defendants? It seems obvious that it was.

The lower Court has itself followed the same rule. In *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), the Brazilian steamer *Mandu* and the German steamer *Denderah* collided in Brazilian waters. The *Denderah* was sunk, and the owner of the *Mandu* petitioned for limitation of its liability.

One of the main points involved was whether or not liability for the collision should be determined according to the Brussels Collision Convention of 1910, which was in force in Brazil. The Court held that it should, saying (p. 463):

> "Liability for tort caused by collision in the territorial waters of a foreign country is governed

by the laws of that country. Smith v. Condry, 1 How. 28, 11 L. Ed. 35; Restatement of Conflict of Laws, section 409. That law not only determines the existence of the liability but also generally determines the measure of it."

When the case came up on the merits, *The Mandu*, 114 Fed. (2d) 361 (C. C. A. 2) the Court found the vessels at fault in unequal degrees, charging four-fifths of the damages to the *Denderah* and one-fifth to the *Mandu*.

What the Court actually did was place a limitation on the *Mandu's* liability to cargo, for under the American rule she would have been liable in full to the cargo-owners, with the right of recoupment or set-off against the *Denderah's* owners. That the reduction of 80% in cargo's recovery against the *Mandu* under the Convention was really a limitation of the ship's liability was recognized by the Court when, after citing *The Titanic*, it said (p. 463) that the vessel's right "further to limit liability" would be governed by United States law.

The fact that the vessels concerned in the *Mandu* case belonged to countries which were signatories to the Brussels Collision Convention, whereas the United States has not adhered to that Convention, is, we believe, of no significance. If liability for tort is determined by the *lex loci delicti* the nationality of the colliding vessels should be wholly immaterial. The Brussels Collision Convention is the law of Belgium whether this Country has adhered to the Convention or not. In *Smith* v. *Condry*, 1 Howard 28, where two American vessels collided in the port of Liverpool, this Court (TANEY, *C. J.*) held that the question of liability must be determined by the law of England.

In *Lauria* v. *E. I. Du Pont de Nemours & Co., Inc.*, 241 Fed. 687 (E. D. N. Y.), the decedent was killed in Virginia while operating an electric car at the defendant's plant.

Suit for his death was brought under the Virginia Death Statute in the United States District Court for the Eastern District of New York. A motion was made to dismiss the complaint on the ground that the Virginia Statute was so unlike the statutory right of action prevailing in New York that the action should not be entertained. The motion was denied, the Court stating (p. 693):

> "The defendant has cited and relied upon the statement made in Wooden v. W. N. Y. & P. R. R. Co., 126 N. Y. 10, * * * that the extent of damages pertains to the remedy rather than to the substantive right. Since, upon that theory, this action might be maintainable for such damages as would be recoverable under the law of New York, although not maintainable for such damages as the Virginia statute allows, it is necessary that I should make it plain, for the purpose of this motion, that I proceed on no such theory. I adopt to its full extent what I conceive to be the true principle, that the measure, elements, and extent of the damages given by the law of the state in which the action arose pertain to the substance of the right, not to the remedy, and that the question of its enforcement in another jurisdiction must be determined with respect to the right as given. The principle was clearly formulated by Mr. Justice Holmes in Slater v. Mexican National R. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. When a liability is enforced in a jurisdiction foreign to the place of the wrongful act, that does not mean that the act is in any degree subject to the lex fori with regard either to its quality or its consequences. Inasmuch as the only source of the obligation is the law of the place of the act, that law must determine its extent. Therefore it is quite inadmissible to resort to the law of the place of the act so far as to show that the act was a tort, and then to determine the consequences according to the accident of the place where the defendant may happen to be found."

Where, therefore, a tort has occurred within the territorial limits of a foreign country, as here, we can see no

escape from the conclusion that the limitation of liability law of that country must control, because it determines the extent of the liability, *Slater* v. *Mexican National R. R. Co., supra,* it is the measure of the maximum recovery, *Western Union Telegraph Co.* v. *Brown, supra,* and it goes to the extent or scope of the cause of action. *Mosby* v. *Manhattan Oil Co., supra.*

POINT II.

The facts of the *Titanic* case make it distinguishable, we believe, from the case at bar. If, however, the rule stated therein is broad enough to include a case such as this one the decision should be re-examined, we submit, and modified to accord with the other decisions of this Court in analogous situations, or overruled.

We did not assign error to the lower Court's interpretation of the *Titanic* decision because it was in our favor; certainly it was not against us. (R. 26). But since the District Court dismissed the petition on the authority of *The Titanic* (R. 14, 15) and because the respondents' counsel will undoubtedly contend that the order should have been affirmed on that ground, a consideration of *The Titanic,* together with four prior decisions of this Court, becomes necessary.

The *Titanic,* it will be recalled, involved a collision between the steamer *Titanic* and an iceberg on the high seas, resulting in great loss of life. But before discussing that decision we shall refer to the earlier ones.

In *The Scotland,* 105 U. S. 24, the British steamer *Scotland* and the American ship *Kate Dyer* collided on the high seas and both were lost. In a suit by the owners of the *Kate Dyer* against the owners of the *Scotland,* the

latter, as a defense, claimed limitation of liability, both under the general maritime law and the American statutes. This Court held that the American limitation law applied and that a foreign ship-owner could claim its benefit. Mr. Justice BRADLEY, after stating the law that would be applied if the collision had occurred in foreign waters, said (p. 29):

> "But, if a collision occurs on the high seas, where the law of no particular State has exclusive force but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision."

In *The Belgenland*, 5 Sup. Ct. Rep. 860 (114 U. S. 355), the Belgian steamer *Belgenland* and the Norwegian bark *Luna* collided on the high seas and the *Luna* was sunk. The *Luna's* owners then libelled the *Belgenland* in the Circuit Court in Pennsylvania and the steamer's proctor excepted to the Court's jurisdiction.

This Court (BRADLEY, *J.*), sustained the lower Court's decision as to jurisdiction and with respect to the applicable law, said (p. 867):

> "As to the law which should be applied in cases between parties or ships of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."

In *Thommessen and another* v. *Whitwill, (The Great Western)*, 118 U. S. 520, the British steamer *Great Western* and the Norwegian bark *Daphne* collided on the high seas. The steamer was later stranded and wrecked through careless navigation. In a suit by the *Daphne's* owners, the owners of the *Great Western* pleaded limitation of their liability under R. S. § 4285. This Court (BRADLEY, J.), allowed limitation, saying that the case was properly decided according to the maritime law of the United States, the law of the forum.

In *La Bourgogne*, 210 U. S. 95, the French steamer *La Bourgogne* was sunk in a collision with the British ship *Cromartyshire* off Sable Island. Numerous suits were brought in various courts in the United States, following which the owner of *La Bourgogne* petitioned for limitation if its liability under the United States statutes in the Federal Court for the Southern District of New York.

The petitioner's right to limitation was upheld and Mr. Justice WHITE, speaking for this Court, said (p. 116):

> "As the petitioner called the various claimants into a court of admiralty of the United States to test whether, in virtue of the laws of the United States, it should be relieved in part at least of liability from the consequences of the acts of its agents, and, as the international rules have the force of a statute, we think the issues presented were of such a character as to render it essential that the right to exemption should be tested by the law as administered in the courts of the United States, and not otherwise."

This brings us to *The Titanic*. There, the White Star Line, owner of the *Titanic*, filed a petition in the Federal Court for the Southern District of New York, asking for limitation of its liability under United States law. Exceptions to the petition were filed because; (1), it did not state facts sufficient to show a cause of action for limitation of

liability under our law; and (2), it showed that the acts on which the claim was based took place aboard a British vessel on the high seas and therefore the British law as to limitation of liability would apply.

The District Court, after a lengthy review of the cases, sustained the exceptions. *The Titanic*, 209 Fed. 501 (S. D. N. Y.). It based its decision largely on the statement of Mr. Justice BRADLEY in *The Scotland, supra*, that if a collision should occur in British waters, at least between British vessels, or on the high seas between vessels of the same nationality, the law of the vessels' flag would be applied in litigation in this country. It also relied on *The Eagle Point*, 142 Fed. 453 (C. C. A. 3) which involved a collision between two British vessels on the high seas, and where the Court held that the law of England limiting the recovery which could be had by cargo against either or both ships was controlling. The Court thought that the *Titanic* disaster, involving as it did a collision between a British ship and an iceberg, fell within the exception stated by Mr. Justice BRADLEY in *The Scotland*, rather than within *The Scotland* and *La Bourgogne* decisions. The petition accordingly was dismissed with leave to the petitioner to amend.

On appeal, the Circuit Court of Appeals, *The Titanic*, 209 Fed. 513 (C. C. A. 2), certified three questions to this Court; (a) whether under the circumstances presented and where nothing appeared as to the law of the vessel's country touching her owner's liability, the owner could maintain a proceeding under R. S. §§ 4283-4285 and the 54th and 56th Rules in Admiralty; (b) whether the owner could maintain such a proceeding in the United States courts under such statutes and rules even though it appeared that the law of the vessel's country provided a different limitation of liability from that prescribed in the United States; and (c), if the answer to (b) was "yes", whether the courts of the United States would enforce

United States law or the law of the foreign country with respect to the amount of the owner's liability.

This Court, Mr. Justice HOLMES delivering the opinion, after citing *The Scotland* and *La Bourgogne*, said that since the American statute did not undertake to impose liability, but only to limit an existing one, it was a limitation on the remedy, and therefore was governed by the law of the forum. The Court accordingly answered questions (a) and (b) in the affirmative, and in answer to question (c) said that the law of the United States would be enforced.

Thus there are the two lines of cases, those cited in our first point, involving torts within a foreign jurisdiction, where the *lex loci delicti* was applied, not only as to liability, but its measure, extent, and any limitations thereon, and those cited in this point, involving torts on the high seas, where petitions for limitation of liability by foreign shipowners were held maintainable under United States law, the reason given, in all the cases but *The Titanic*, being that under the circumstances the maritime law of this country furnished the proper rules of decision. Since the present collision occurred in Belgian waters, this case, it seems to us, clearly falls within the first group and not the second.

There is a rational basis, we think, for resolving these two lines of decisions. It is the *locus* of the tort, as between the high seas and the limits of a particular sovereignty. Mr. Justice HOLMES himself seemingly was mindful that there is such a distinction, as evidenced by his reference, in *American Banana Co.* v. *United Fruit Co.*, *supra*, to the high seas as a region "subject to no sovereign." Evidently he doubted whether the *Titanic* decision would apply to a tort committed in a foreign country, for when holding in *Western Union Telegraph Company* v. *Brown*, *supra*, that the foreign law determines not only

liability but "the measure of the maximum recovery", he added only that limitation of liability "may" stand on different grounds.

In short, it seems to us that the Court did not have to say in *The Titanic* that limitation of liability is in the nature of a remedy in order to uphold the petition of the White Star Line. The earlier decisions in *The Scotland*, *The Great Western*, and *La Bourgogne*, as we have seen, were not based on any such theory. Rather, their rationale was that since the particular torts occurred on the high seas, where the law of no country has exclusive application, the law of the United States as to limitation of liability will be applied where foreign ship-owners become involved in litigation in our courts. It would appear to have been unnecessary to go further than this in answering the questions certified in *The Titanic*.

To view limitation of liability itself as a remedy is, we suggest with the utmost deference, to place the end sought in the same category with the procedural machinery through which that end is attained. In other words, limitation of liability is, we submit, "an absolute legal right," as stated by the District Court in *The Titanic* (p. 509), but, as in the case of any other right, it must be secured through varying modes of procedure.

A few examples will suffice to illustrate the difficulties into which we are led by conceiving of limitation of liability as a remedy. A ship-owner seeking limitation of liability has at least two methods available. He may file a petition for limitation under R. S. § 4285, 46 U. S. C. A. § 185, and Supreme Court Rule 51, or he may plead limitation of liability as a defense under R. S. § 4283, 46 U. S. C. A. § 183, *The Scotland*, *supra* (pp. 18, 19); *The Chickie*, 141 Fed. (2d) 80, 85 (C. C. A. 3). (The petitioners have also pleaded the Belgian limitation law as a defense in their answer to the respondents' libel). If a ship-owner elects

to plead limitation of liability as a defense is he pleading a remedy? Again, if he relies on the $500 per package limitation of the Carriage of Goods by Sea Act, 46 U. S. C. A. §1304(5) is he relying on a remedy rather than a statutory right? We should suppose that the answers would be "No". Limitation of a ship-owner's liability is, to our mind, no more a remedy than a limitation on the amount recoverable in a death case. *Northern Pac. R. Co. v. Babcock, supra.* If it is to be considered as a remedy we fear that Bouvier's definition of a remedy as "the means employed to enforce a right or redress an injury," *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 384, needs some revision.

The bearing of the *Titanic* decision on a situation such as this one, has, so far as we are aware, been commented upon in but two cases, *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), and *Royal Mail Steam Packet Co.* v. *Companhia de Navegacao Lloyd Brasileiro*, 31 Fed. (2d) 757 (E. D. N. Y.).

In *The Mandu*, (already discussed, pp. 15, 16) the Court, after holding that the law of Brazil governed in determining both the liability and the extent of the liability of the colliding ships, said that any limitation of liability beyond that resulting from the application of the provisions of the Collision Convention would be determined by the law of the United States under *The Titanic*. It will be noted, however, that the bond posted by the *Mandu's* owner was for her full value, and that the owner petitioned for limitation of liability under United States law (*Mandu* Record, pp. 52-60). Since the owner of the *Denderah* had contended that the Brussels Collision Convention did not apply it could not very well say that limitation of liability was governed by the Brussels Limitation Convention. In short, there was no issue between the parties as to what limitation of liability law should apply, with the result that the only law that could possibly be applied was that of

the United States. The reference to *The Titanic*, was therefore dictum.

In *Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro*, the British steamer *Silarus* collided with the Brazilian steamer *Almirante Jaceguay* in the River Schelde near Antwerp. A suit for damages was then brought by the owner of the *Silarus* and the respondent made a motion asking the Court to decline jurisdiction. On the denial of the motion the respondent filed an answer setting up the limitation of liability statute of Belgium as a defense and claiming limitation thereunder. The libellant excepted to the defense and the respondent submitted to the exception in open court and consented to an order striking the defense out. The libellant later amended its libel to allege that liability for the collision was governed by the law of Belgium. Thereupon the respondent filed an amended answer in which it again set up the Belgian limitation law as a defense. It attempted to justify this action because of the amendment of the libel. The libellant excepted to this defense and the exceptions were sustained.

In the course of its opinion the Court said that the right to limit liability is controlled by the statutes of the United States, which relate not to the right or liability but to the remedy, citing *The Scotland*, *La Bourgogne* and *The Titanic*. It is plain, however, that the respondent had become involved in such a procedural tangle through its previous actions that it had in any event foreclosed itself from relying on the Belgian limitation law. This was emphasized by the Court, which pointed out that the respondent, because of its acquiescence in the exception to its original defense, had in effect conceded that limitation of liability relates to the remedy and is governed by the law of the forum, and that its questioning of the libellant's right to amend came too late because it had not excepted to the amended libel. Thus the Court was not required

to decide which limitation of liability law was the applicable one.

Since this Court, where a question of conflict of laws has been involved, has drawn a clear line of distinction between torts committed on the high seas, where no Nation is sovereign, and torts committed within the boundaries of another jurisdiction, it is difficult to believe that it intended, in deciding *The Titanic*, to make limitation of liability an exception to the rule stated in the cases within the second class. Indeed, the rule, as stated on those cases, is sufficiently broad and specific to include limitation of liability.

It would seem that the *Titanic*, even though the collision was with an iceberg instead of another vessel, falls directly within the doctrine of *The Scotland*, *The Belgenland*, *The Great Western* and *La Bourgogne*, *supra*. If so, the statements in the opinion that limitation of liability is a remedy were unnecessary and we venture to suggest that the decision should be modified accordingly. It appears, further, that the decision could stand some modification or explanation to make it clear that it does not apply to torts committed within a country or state other than the one in which suit is brought. Lastly, if there is no other alternative, the decision, we respectfully suggest, should be overruled.

POINT III.

If the Court finds that the law of Belgium as to limitation of liability is the applicable one, the petitioners, we submit, should be held entitled to claim the benefit of that law by petition.

The respondents' exceptions, as stated, were based on the alleged failure of the petitioners to transfer their interests in the vessel and her freight to a trustee or to deposit with the court a sum equal thereto or approved security therefor under 46 U. S. C. A. § 185 and the Admiralty Rules of this Court (R. 13). The District Court sustained the exceptions partly for this reason (Order, R. 14, 15; Conclusion of Law, No. 5 R. 19). But whatever reasons the respondents' counsel may advance on this basis to defeat the petition as to Black Diamond—and we believe they cannot be sustained—such reasons can have no application whatever to the United States, which was not required to post any bond or transfer any interest to a trustee.

The lower Court, although apparently considering the Belgian law to be controlling if its limitation attaches to the right, held, for reasons that are not clear to us, that the petitioners could not invoke that law by petition but could raise it as a defense. (See discussion in Point IV, pp. 29-31). The petitioners, as previously stated, have pleaded the Belgian limitation law as a defense in their answer to the respondents' libel. But a concourse of claimants cannot be secured by a defense as it can be by petition.

Article 1 of the Brussels Limitation Convention limits the ship-owner's liability to the value of the vessel and her freight (Petition, Art. Twelfth, R. 7). Up to this point the Convention is worded virtually the same as our statute. The proviso in Article 1, however, places a limit of £8. per ton on value and Article 4 defines freight as a lump sum

equal to 10% of the vessel's sound value. Thus while in some instances the value of the ship on the £8. per ton basis might be less than her actual value, the freight, fixed on the arbitrary 10% basis, might be far in excess of the actual freight. In any case the Convention fixes the value of the ship and freight for limitation purposes.

The respondents' counsel probably will argue that the term "interest" in our limitation statute and this Court's Rules should be construed literally and held to mean the petitioners' whole interest in the vessel and her freight. If, however, the Court holds that limitation of liability is governed by the law of Belgium, the petitioners' "interest" in the vessel and her freight would, it seems clear, be that fixed by the Belgian law, and it is that interest for which Black Diamond has posted a bond for $325,028.79.

The District Court, in *The Titanic*, evidently saw nothing out of the way in permitting the White Star Line to set up the British limited liability law in its petition, for after dismissing the petition on the ground that the British law applied, it granted leave to amend (p. 512) which could only have been for the purpose of allowing the petitioner to set up the English statute.

We do not see how it would do any violence to R. S. § 4285 to take the petitioners' interest in the ship and her freight at the figure arrived at under the Convention's provisions. To do so would simply be to follow the consistent policy adopted by the courts of construing the statute liberally in favor of ship-owners.

In *Coryell* v. *Phipps*, 317 U. S. 406, this Court, referring to the construction of the statute with respect to privity, said (p. 411):

> "That construction stems from the well settled policy to administer the statute not 'with a tight and grudging hand' (Mr. Justice Bradley in Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 589), but 'broadly and liberally' so as 'to achieve

its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner.' *Just* v. *Chambers*, 312 U. S. 383, 385."

See also: *Larsen* v. *Northland Trans. Co.*, 292 U. S. 20, 24.

The policy of the courts to interpret the statute broadly is well illustrated by *The Scotland*, *supra*, where limitation of the liability was pleaded as a defense. Objection was made that the ship-owners did not follow the statute by giving up and conveying to a trustee the strippings of the wreck and the pending freight. The Court said (p. 34) that this was not necessary; that where all the parties injured appeared as libellants or intervenors, an answer setting up such a defense gave the ship-owners all the protection they needed; and that it was sufficient to enter a decree against them for the amount of their limited liability and to distribute the sum among the parties entitled to it.

We therefore respectfully submit that this petition should be sustained.

POINT IV.

The reasons given by the lower Court for affirming the District Court's order of dismissal, have, it is believed, no application to this case.

We have had considerable difficulty in understanding the lower Court's opinion, but if we interpret it correctly it found the petitioners to be in a dilemma because of the disparity between the value of the *Norwalk Victory*, concededly $1,000,000. at the time of the collision, and the asserted limitation of $325,000. on the petitioners' liabilities under the Belgian law.

The first horn of the dilemma, thought the Court, made it impossible for the petitioners to commence this proceeding at all if the limit of their liabilities was $325,000. when the ship's value was $1,000,000. In support of this holding the Court cited *The Aquitania*, 20 Fed. (2d) 457 (C. C. A. 2), *Curtis Bay Towing Co.* v. *Tug Kevin Moran*, 159 Fed. (2d) 273 (C. C. A. 2), and *The George W. Fields*, 237 Fed. 403 (S. D. N. Y.). The *Aquitania* and *Curtis Bay* cases, however, involved situations in which the known or foreseeable claims were nowhere near the ship's value (which of course fixed the limitation of liability under United States law) and limitation proceedings were accordingly held to be without basis. The petition was sustained in the *Moran* case because it appeared likely that the claims might exceed the tug's value. The situation here is just the reverse of that in the *Aquitania* and *Curtis Bay* cases, for the known claims exceed many times over the limitation claimed. Counting in the claim for the loss of the *Merganser* alone, the claims approximate $2,000,000.

Under the second horn of the dilemma, it is said, the bond posted by Black Diamond is too small if the liabilities may exceed $325,000. But if the Belgian law is held applicable the value of the *Norwalk Victory* would be immaterial, since it was not lower than £8. per ton, plus freight, as fixed by the Convention. If limitation were to be determined by United States law, the bond of $325,028.79 is of course too small.

It all comes down in the last analysis to the question as to which is the applicable law. If the Belgian law governs—and the lower Court's view seemed to be that it does, if it attaches to the right (R. 27)—there is, as we see it, no dilemma at all. The dilemma only arises by bringing in the American law as opposed to the Belgian law, which is the very question to be decided.

The Court also said that the petitioners were confined to asserting their privilege (namely, limitation of liability)

as a defense to suits brought against them (R. 27). But it then went on to say that the questions raised by the petition could only arise if the petitioners were sued at law, citing *Ex Parte Green*, 286 U. S. 437. We do not see the applicability of the *Green* case. There Green sued Langnes, the owner of the vessel *Aloha*, in the Superior Court of Washington. Langnes then filed a petition for limitation of liability in the federal court. This Court, in *Langnes* v. *Green*, 282 U. S. 531, had held that the district court should have permitted the action to proceed in the State court, retaining the limitation petition for future action, if necessary. Later Green made an issue in the State court as to the right of Langnes to limitation and this Court, in *Ex Parte Green*, held that if Green pressed the issue it was cognizable only in admiralty, but if he withdrew it the case could remain in the State court. We fail to see how any such situation exists here. The present question is whether, if the Belgian limitation law applies, the petitioners, aside from having the right to plead that law as a defense, may invoke it by a petition for limitation of liability.

Lastly, the Court stated that the only suit against the petitioners in this country is in admiralty, wherein the right to limit can be tried, but it qualified this remark by saying, or indicating, that the petitioners would be faced by the same dilemma in the admiralty suit as was thought to exist in connection with the limitation petition.

The lower Court, in short, failed to decide the question presented by this petition, and, instead, sustained the dismissal of the petition on what we believe to be altogether erroneous grounds. It should, we submit, have held that the Convention places a limitation on the rights of claimants against the vessel, that the Belgian limitation law governs, and that the petitioners could properly invoke such law by this petition.

POINT V.

A denial of the benefits of the Belgian limitation of liability law to the petitioners would lead to the anomalous result of depriving Black Diamond of any real limitation of liability at all.

Since Black Diamond was the bareboat charterer of the *Norwalk Victory*, and hence her owner *pro hac vice*, it was responsible for her navigation. *Leary* v. *United States*, 14 Wall. 607; *Hahlo* v. *Benedict*, 216 Fed. 303 (C. C. A. 2). Therefore, in the absence of some provision in the charter making the United States liable, Black Diamond ultimately will have to stand the entire loss, if liability is found to exist. The United States, moreover, is not a party to the British suit.

Consider the predicament in which Black Diamond would find itself if limitation of liability herein were to be decided by the law of the forum. Under United States law the limitation of liability would be at least a million dollars, because that was the floor price placed on Victory ships by the United States Maritime Commission. Pending freight and passage money probably would be about offset by the relatively minor collision damage sustained by the *Norwalk Victory*. If Black Diamond were to petition for limitation of liability under our law, it would be required to deposit an *ad interim* stipulation of approximately one million dollars. But it has already posted bail equivalent to a million dollars in the High Court of Justice of England in the suit brought against it by the *Merganser's* owner (Petition, Art. Seventh, R. 6).

If the law of England were the same as ours we would have filed a petition for limitation of liability there di-

rectly after the commencement of the suit for the loss of the *Merganser*. We were advised by our London solicitors, however, that under the English practice a ship-owner must admit liability before a petition for limitation of his liability will be entertained. This, of course, made the filing of a petition impossible, as we denied liability.

The British practice is set forth in *Hill* v. *Audus* (1855), 24 L. J. Ch. 229, where the Court, considering the Merchant Shipping Act of 1854, said (p. 231):

> "It was obviously the full intention of the act of George the Third that the owner should be permitted to come into court, and say, 'I am liable; I want to bring the fund into court and to be protected from a multiplicity of actions.' All this is very much in the nature of interpleader; and the only question is, the extent of damage suffered by each party. The present act is certainly wider in its terms than some parts of the former act— * * * The section (514) gives the first charge on the fund to the Board of Trade, and then it goes on to enable this Court to determine the amount of liability, and to distribute the fund among the several claimants. All that the Court has to do is, to ascertain the amount of liability under this section; but if a suit should be instituted in which it should be found that there was, after all, no liability, then all the proceedings would have had to be gone through, and, after all, it might be found that the whole suit was about nothing. There would be no amount to be ascertained, and nothing to be divided. The words of the 514th section, that create the difficulty, must mean that the owner is to come into court, and say, 'I allege upon the face of my bill that I have incurred some liability, and I apprehend claims with respect to that liability,' and to bring the fund into court; and what the legislature means is, that the owner having admitted the fact of his liability, the Court is to get in the fund and distribute it among the several claimants. The act intended that the proceedings should be taken here after the liability had been admitted. A considerable

and proper advantage is given, after that, to persons bringing their actions, which explains the subsequent clause about stopping all actions. As soon as this Court takes upon itself to ascertain the amount of damage all actions are stopped, but they are only stopped on the terms of liability to some degree being admitted."

The majority of the respondents, aside from the British Government, are British nationals. Had we been able to institute limitation proceedings at once in England we could have had the British cargo-owners, with the possible exception of the Crown, and any of the other interested parties who might have been subject to the jurisdiction of the Court, restrained from prosecuting their claims elsewhere than in the English limitation proceedings. As it is, Black Diamond is faced with this suit in the United States on top of the British suit.

And this is not all. There are still the claims of the Belgian Government for the expense of removing the wreck of the *Merganser* and for damage to the bank of the River Schelde (Petition, Art. Seventh, R. 6). That Government, we understand, has a statutory claim on the owner of the *Merganser* for the removal cost, independent of any question of fault, and this claim is of course subject to the owner's right of limitation of liability. The Belgian Government, in addition to suing for damage to the river bank, can therefore be expected to come back on Black Diamond for whatever part of the expense of raising the wreck may be uncollectible from the *Merganser's* owner. (We have recently learned that the Belgian Government has already started suit in a Belgian Court.) The owner of the *Merganser* will of course add any amount paid to the Government onto its claim against Black Diamond. Besides all this there is a claim for the death of the *Merganser's* steward and, for all we know, there may be additional cargo claims.

If the *Norwalk Victory* were held to be solely at fault, Black Diamond—unless it can secure limitation under the Belgian law—would have to pay out something approaching a million dollars on the respondents' claims, plus whatever amount the English Court might decree for the loss of the *Merganser* and the death of her steward, plus the amounts awarded to the Belgian Government. The net result would be that Black Diamond would have to pay claims far in excess even of the high limitation of liability under American law, to say nothing of the Belgian law. Such a result as this, in addition to being palpably unjust, might be well nigh disastrous.

In spite of the fact that the collision occurred in Belgian waters, on a voyage of the *Merganser* from England to the Continent, and with the Courts of England, Holland and Belgium open to them, the respondents have seen fit to resort to our courts, over 3,000 miles from their home shores, with the hope of bettering their situation in reliance on the *Titanic* decision and the practically prohibitive limitation under United States law. Could there be a better example of the injustice of applying the varying limitation of liability laws of different countries, depending solely on the location of the suit, in a case where a tort has been committed within a particular jurisdiction? We believe that the reasons for applying the *lex loci delicti* are unanswerable.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and this petition for the limitation of the petitioners' liability under the terms of the Brussels Limitation Convention should be upheld.

Dated, New York, November 19, 1948.

Respectfully submitted,

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Appendix A.

The relevant provisions of the Brussels Limitation Convention are as follows:

"Article 1. The liability of the owner of a sea-going vessel is limited to an amount equal to the value of (fol. 9) the vessel, the freight, and the accessories of the vessel, in respect of—

(1) Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

* * * * * * * *

(5) Any obligation to raise the wreck of a sunken vessel, and any obligations connected therewith;

* * * * * * * *

Provided that, as regards the cases mentioned in Nos. (1), (2), (3), (4) and (5), the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to £8 per ton of the vessel's tonnage.

* * * * * * * *

Article 4. The freight referred to in Article 1 (including passage money), is deemed, as respects vessels of every description, to be a lump sum fixed at all events at ten per cent. of the value of the vessel at the commencement of the voyage.

* * * * * * * *

Article 7. Where death or personal injury is caused by the acts or faults of the captain, crew, pilot or any other person in the service of the vessel, the owner of the vessel is liable to the victims or their representatives in an amount exceeding the limit of liability provided for in the preceding Articles up to £8 per ton of the vessel's tonnage.

* * * * * * * *

Article 10. Where a person who operates the vessel without owning it or the principal charterer is liable under one of the heads enumerated in Article 1 or (fol. 10) Article 7, the provisions of this Convention are applicable to him.

Article 11. For the purposes of the provisions of the present Convention, 'tonnage' is calculated as follows:

In the case of steamers and other mechanically propelled vessels, net tonnage, with the addition of the amount deducted from the gross tonnage on account of engine-room space for the purpose of ascertaining the net tonnage; * * *"

Appendix B.

Sections 4283(a) and 4285 of the Revised Statutes, as amended by the Act of June 5, 1936, 46 U. S. C. A. § 183(a) and § 185, read as follows:

"Sec. 4283(a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Sec. 4285. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."